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A PROBLEM IN THE DRAFTING OF WORKMEN'S COMPENSATION ACTS.

[I. — *Continued.*]

"*Arising out of and in the Course of Employment.*"

"ARISING out of, points to the origin or cause of the accident, and, in the course of, to the place and circumstances under which the accident takes place"[1] and the time when it occurred.[2]

The injury must be received in the course of employment and must also arise out of it; neither alone is sufficient.[3] In the great

[1] Buckley, L. J., in Fitzgerald *v.* Clarke & Co., [1908] 2 K. B. 796, 1 B. W. C. C. (Butterworth's Workmen's Compensation Cases) 197 (C. A., 1909).

[2] See Loreburn, L. C., in Moore *v.* Manchester Liners, Ltd., [1910] A. C. 498, 500, 3 B. W. C. C. 527, 529: "The first inquiry is, Was he doing any of the things which he might reasonably do while employed? . . . The next inquiry is, Did the accident occur within the time covered by the employment? . . . The last inquiry is, Did the accident occur at a place where he may reasonably be while in the employment?" Not only is this definition extremely vague but it is contained in a dissenting opinion by Lord Loreburn, holding, contrary to the majority of the House of Lords, that, judged by this test, the plaintiff was in the course of employment. And see Lord Justice Farwell's criticism of it in Kitchenham *v.* S. S. Johannesburg, [1911] 1 K. B. 523, 531.

[3] It may appear at first glance that unless the servant is actually engaged in work in the course of his employment no injury sustained by him can be caused by it and so arise out of it. See Farwell, L. J., in Kitchenham *v.* S. S. Johannesburg, [1911] 1 K. B. 523, 530, and the Lord President in M'Lauchlan *v.* Anderson, 48 Scot. L. Rep. 349, 4 B. W. C. C. 376 (Ct. Sess., 1911). While this is generally true, cases may arise where an injury is caused by an employment which at the time of the accident the servant has, under the decisions, left or not yet entered upon. An injury sustained by a servant on his way to or from work at some highly dangerous place over which,

majority of cases the requirement that the injury be received in the course of the employment is the broader of the two, the requirement that it must arise out of the employment in general operates to restrict recovery to such injuries only, among those which the workman sustains while in the course of his employment, as also arise out of it.

The phrase "in the course of employment" presents two principal questions. The first concerns the period of employment. When does it begin and end, and, during this period, when is its continuity broken? The second raises the question as to how far the servant during the period of employment places himself outside thereof by doing that which he is not employed to do, or by doing his appointed work at a place other than that which his master has appointed for that purpose, or by deliberately adopting a method of performing the work other than that prescribed by his master or forbidden by him.

After some little vacillation it is finally settled that the term "in the course of his employment" is not limited to those periods during which the servant is actually engaged upon work which he is employed to perform. "'In the course of employment' does not mean 'in the course of industrial work.'"[4] Nor is it limited to the time for which wages are paid. Indeed the fact that the workman is paid wages for the time when the accident occurs is of little, if any, importance.

On the other hand, it is well settled that the course of employment does not include all the many acts of which the employment is the sole or at least predominant cause, which are done solely because the doer is engaged in a particular employment at a particular place, and which neither an idle man nor one engaged in another employment would have occasion to do.[5] So wide a construction

though outside the master's premises, he is obliged to pass, seems to be as directly caused by his employment as an injury received upon his master's premises, but before or after his actual work has begun or ended. See Lord McLaren in Menzies *v.* McQuibban, 2 Fraser 732, 735–736 (Scot. Ct. Sess., 1900). In such cases recovery is denied solely on the ground that the employment is held not to begin until the servant enters his master's premises and to end when he quits it. See Holness *v.* Mackay & Davis, [1899] 2 Q. B. 319, 1 W. C. C. (Workmen's Compensation Cases) 13, which seems to have been such a case.

[4] Fletcher Moulton, L. J., in Riley *v.* Holland & Sons, Ltd., [1911] 1 K. B. 1029, 1033.

[5] See Holness *v.* Mackay & Davis, [1899] 2 Q. B. 319, 1 W. C. C. 13, where the workman was not only required to go upon a railway company's premises and cross its

would include not only the whole of the journey to and from work upon the public highways and premises of third persons, but also every act done in preparation for the employment, even to the putting on of working clothes at the workman's home.

The course of employment, therefore, is neither limited to the period of actual labor nor is it extended to include all acts necessitated by the workmen's employment. The workman is not regarded as outside the scope of his employment unless actually at work or in the receipt of wages, nor is he regarded as within it because what he is doing is something which has relation only to his work. The test finally adopted lies between the two. The place at which the injury is sustained becomes the determining factor among those things which he does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment.

The employment may be either for an extended period, as a week, month, or year, during which the master is entitled to the entire time of the workman, as in the case of seamen and domestic servants, or on the other hand, it may be for a limited number of hours in each day, as in the case of laborers and employees in factories. If the employment be in the first class, it seems reasonably well settled that the employment begins when the employee presents himself at the beginning of his term of service upon his master's premises, or at the place designated by the latter. The only difficult questions which arise are those concerning his temporarily quitting the service and his return thereto. It is only in those cases where the employment is to devote a certain number of working hours to some definite piece of work that the question as to when the employment begins and ends usually becomes vital.[6] In the great

tracks because of his employment by a contractor with the railway, but would have been a trespasser had it not been for the implied license which he had as the servant of the contractor.

[6] This question of course arises once even in an employment of an extended time, *i. e.* when the servant originally goes into service. See Whitbread *v.* Arnold, 99 L. T. 103, 1 B. W. C. C. 317 (C. A., 1908). But it arises daily when the employment is for a number of hours a day.

majority of such employments neither the actual work nor the wages begin until after the workman has reached some point well within his master's premises or the place at which the master is carrying on his business.

Both the English and Scottish cases agree that the employment begins when the workman has arrived at the place where his actual work is to be done though the work itself has not begun. And they agree that he is in the course of his employment if he is engaged in doing some act which he is required to do upon the employer's premises in preparation for his labor, or when he reaches some place upon his employer's premises where such required preparatory work is to be done.[7] The English cases go further, and regard him as in the course of his employment when he is using as a means of approach to or exit from the scene of his duties some part of his master's premises, provided by the master for such use or which the workmen have used for this purpose with the master's knowledge and with his consent, or at least without his prohibition.[8]

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[7] Anderson *v.* Fife Coal Co., Ltd., [1910] Scot. Sess. Cas. 8, 3 B. W. C. C. 539, in which it was held that a miner was not in the course of his employment until he had reached the spot where he was to get his lamp. The Lord Justice Clerk rejects the rule that the moment a man enters the premises of his master he is in the course of employment, and adopts the rule that "he must come to some point at which he enters upon the work which he has to do." Compare Tod *v.* The Caledonian Ry. Co., 1 Fraser 1047 (Scot. Ct. Sess., 1899), with Caton *v.* The Summerlee, etc. Co., Ltd., 4 Fraser 989 (Scot. Ct. Sess., 1902). But see Haley *v.* The United Collieries, Ltd., [1907] Scot. Sess. Cas. 214; Hendry *v.* The United Collieries, Ltd., 47 Scot. L. Rep. 635, 3 B. W. C. C. 567 (Ct. Sess., 1910), in which workmen, injured in the one case on his way to get his pay and in the other on his way home, were denied compensation not because they were not at their working places but because they had not used the paths provided by their employers.

[8] Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539, 2 B. W. C. C. 42; Hoskins *v.* J. Lancaster, 3 B. W. C. C. 476 (1910). It is enough that the workman is using a path or route which is customarily used by workmen to the master's knowledge, at least if the master has not forbidden its use. While a workman may not loiter unnecessarily upon his employer's premises, Smith *v.* South Normanton Colliery Co., Ltd., [1903] 1 K. B. 204, 5 W. C. C. 14; Benson *v.* Lancashire & Yorkshire Ry. Co., [1904] 1 K. B. 242, 6 W. C. C. 20, he is allowed a reasonable time to get to and from his work. What is a reasonable time depends on the circumstances of the case. So if the workmen are obliged to come and go by trains which arrive and leave some little time before and after the work begins and ends, the workmen are not required to pass these intervals on the public highways, but are in the course of their employment while passing them upon their employer's premises, especially if their custom of so doing is known to their employer and he has provided for their accommodation. Sharp *v.* Johnson & Co., [1905] 2 K. B. 139, 7 W. C. C. 28.

And a workman is held to be in the course of his employment while traveling to or from his work upon the conveyance which, though not owned or controlled by the employer, is provided by him for the sole use of the employees and which the workman, though not required, is permitted to use by virtue of his contract of employment.[9]

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[9] Cremins *v.* Gest, Keene & Nettlefolds, Ltd., [1908] 1 K. B. 469, 1 B. W. C. C. 16. In this case mine owners provided a daily train by which their employees traveled to and from the nearest town to the mines. The coaches were the property of the employers, but the engine was owned by the railway, which operated the train with its own crew and over its own line. The train was run exclusively for the use of the miners, no charge being made for conveyance upon it; but the miners were not required to travel by it and no allowance was made to those who did not travel by it.

The accident happened at the platform upon the railway property which had been constructed by the mine owners and was repaired by them. The platform was two hundred yards from the mine premises, and in order to reach them the miners had to pass along a public highway. The claimant's decedent was killed by being pushed from the platform in front of a train by a rush of fellow workmen who were seeking to board the train. Therefore, while the coaches were owned by the employers and the platform was repaired by them, the injury was not received by reason of any bad condition therein, and the case seems to stand for the broad proposition before stated. It would seem that the mine owners would have been liable as fully had they not owned the coaches nor had provided the platform and had control of it for the purpose of lighting and repairs. See, however, Davies *v.* Rhymney Iron Co., 16 T. L. R. 329, 2 W. C. C. 22 (C. A., 1900), and Walters *v.* Stavely & Co., 4 B. W. C. C. 89 (C. A., 1910), 4 B. W. C. C. 303 (H. L., 1911), especially Lord Shaw, pp. 305–306, and *cf.* Holmes *v.* Gt. Northern Ry. Co., [1900] 2 Q. B. 409, 2 W. C. C. 19.

It is difficult to reconcile this case with Whitbread *v.* Arnold, 99 L. T. 103, 1 B. W. C. C. 317 (C. A., 1908), decided six months later by the Court of Appeal, Cozens-Hardy, M. R., sitting in both cases, in which it was held that a shepherd was not in the course of his employment under the following circumstances: In accordance with the general custom among the farmers it was a part of the contract between the farmer and those whom he engaged as farm laborers that a wagon should be sent by the farmer on the day when the servant was to begin, to convey the laborer and his family and goods from his residence to the cottage which was furnished as a part of his compensation. While proceeding in this wagon to the farm he was thrown from the wagon and killed; it was held that the employment would not commence until the deceased had entered upon his duties as shepherd.

It is not enough that the employer shall provide railway tickets where the employment is to be at a distance from the workmen's residence, but the conveyance must be one provided by the master for the sole use of servants, and upon which his servants alone, because of their service, have the right to travel. The present of the ticket is either a pure gratuity or a part of the wages paid, and the master is no more liable to one using it than he would be to a servant to whom he had given a sum to pay his car fare or to whom he had paid an additional wage because the servant lived at a distance and required the additional sum for this purpose. It is highly doubtful whether American courts will hold that servants in circumstances like that of Cremins' case are in the course of employment. The general trend of American authority is to

It is not necessary that the servant should be on his way to or from his actual labors. He is in the course of employment if he goes on the premises where his employer's business is being carried on for the purpose of preparing himself for his work, as by obtaining information as to when his work will begin at some future time,[10] or for the purpose of getting pay which it is the master's duty under the contract of employment to pay to the workmen upon his premises; and this is so whether the workman is still in the master's employment or whether the relation of master and servant has entirely ceased, nothing remaining to be done except pay off the servant.[11]

The general result reached by the English cases may be stated as follows: The workman is regarded as in the course of his employment when he is upon the premises upon which his master's business is being carried on, if his presence thereon is incidental to his work, and is therefore required or sanctioned by his contract of employment. The place at which the workman was injured becomes the determining factor. Nothing done outside his master's premises is in the course of employment. It is not enough that the servant be upon land owned by the master; he must be within the boundaries of those premises where the master's business is being carried on and the servant's work is to be done.[12]

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hold that a servant of a railway, traveling upon the train of the company on a free pass or upon a train provided by the company for its employees, is a passenger and not a workman at all unless he is obliged to travel by a train provided especially for the carrying of workmen of his class.

[10] But not when a servant who has been paid off returns to the premises to complain of a supposed error in the amount. Phillips *v.* Williams, 4 B. W. C. C. 143 (C. A., 1911).

[11] Or where he goes on the premises to remove his own tools some days after he has been discharged or has quitted the defendant's service. Molloy *v.* South Wales, etc. Co., 4 B. W. C. C. 65 (C. A., 1910).

[12] Gilmore *v.* Long & Co., 4 B. W. C. C. 279 (C. A., 1911). And this is so though the master has provided a path over such other land, chiefly for the convenience of his workmen to whom it provides a short cut between two highways. Walters *v.* Stavely & Co., 4 B. W. C. C. 89 (C. A., 1910), 4 B. W. C. C. 303 (H. L., 1911). *Cf.* Cremins *v.* Gest, Keene & Nettlefolds, Ltd., [1908] 1 K. B. 469, 1 B. W. C. C. 16, *ante*, note 9. See also Parker *v.* Pont (C. A., Oct., 1911), briefly reported in 131 L. T. J. 552.

Gilmore *v.* Long can be reconciled with Taylor *v.* Jones, 123 L. T. J. 553, 1 B. W. C. C. 3 (Ely Co. Ct., 1907), in which a farm laborer was allowed compensation for an injury received while climbing a stile on his employer's farm several fields from that where he was to work, only by regarding as decisive the fact that the place of the injury and of the work are on the same tract.

When a servant, employed for an extended period, has temporarily quitted his employment, with or without his master's leave, the question arises as to whether he has reëntered the employment. This question is most frequently presented in those cases[13] where sailors who have gone on shore-leave are injured in returning to their vessel. Accidents to sailors under these particular circumstances are particularly frequent for two reasons: One, their tendency to drink to excess when on shore; and the other, that in their return to the ship they are subjected to certain special risks. When their ship is in the roads it can only be reached by boat; even when it is in dock, the approach to it is usually along ill-lighted quays and over slippery ladders and insecure gangways.

A sailor may be sent ashore on a ship's errand, in which case his employment continues though not upon the vessel;[14] or, on the other hand, he may have gone ashore with leave but for some private purpose of his own, or he may have gone off without leave. In either case he temporarily quits the service, and his right to recover depends upon whether at the time he is injured he has or has not reëntered it.

A distinction is indicated, though not clearly expressed, between sailors going ashore with and without leave. In the first case he may not recover for injuries received upon the public docks or quays, nor while attempting to board a public boat hired by him to take him to his vessel. Some of the earlier cases required the sailor to have actually returned to the vessel itself, and did not regard as part of the vessel gangways and ladders, though owned and controlled by the ship and provided as a means of access thereto or

[13] Arising under the Act of 1906, which, unlike the Act of 1897, provided compensation for sailors.

[14] Jones *v.* The Alice and Eliza, 3 B. W. C. C. 495 (C. A., 1910). Here the master of a small schooner went ashore to a public house, in order, among other things, to meet and pay off a laborer who had done some work for the ship. While returning he fell off a public quay to which the boat was moored at a point some distance from it. It was held that he was entitled to compensation. See also Nelson *v.* Belfast Corp., 42 Ir. L. T. 223, 1 B. W. C. C. 158 (C. A., Ir., 1908), where a laborer on the public roads left his place of work and, in order to get his pay, went to the corporation offices. An injury received, while returning upon the highway, at a point far distant from his place of work was held to arise out of and in the course of his employment. This case is regarded by Judge Ruegg in his work on Employers' Liability and Workmen's Compensation, 8 ed., 372, as somewhat doubtful, and it would seem with reason, as, although the laborer was allowed to go for his pay during his working hours, his errand was at best "ancillary to his employment" and was not upon his employer's business.

so used with the knowledge and permission of those in command.[15] Recent cases, however, hold that any means of access provided by the vessel and permitted by those in command to be used for that purpose are a part of the vessel, and that a sailor on his return from shore-leave reënters employment when he has actually reached such means of access.[16] These cases proceed upon the same principles as those which, as has been seen, determine when the employ-

[15] McDonald *v.* S. S. Banana, [1908] 2 K. B. 926, 1 B. W. C. C. 185. Compare with this Robertson *v.* Allan Bros. & Co., 98 L. T. 821, 1 B. W. C. C. 172 (1908), decided by the same court three months earlier. In the first, where the claimant fell from a gangway leading from the dock to the ship and was drowned, compensation was refused. In the second, the claimant, who was drunk, came on board by way of a cargo skid which, while not the proper or provided means of access to the ship, was habitually so used by the crew. In stepping from the skid to the deck he slipped and tumbled into an unguarded hole in a hatch and was killed. Recovery was allowed. Cozens-Hardy, M. R., who took part in both decisions, can see no inconsistency between the two cases — for in Robertson's case the man had got on board the vessel, while "in the Banana case the accident happened before he had got on board and although he was very close to the vessel, and on his way back, the result must be the same as if the accident had happened while he was on the road returning to the ship, or on the quay itself." Moore *v.* Manchester Liners, 2 B. W. C. C. 87, 89 (1908).

[16] Moore *v.* Manchester Liners, [1909] 1 K. B. 417, 2 B. W. C. C. 87; [1910] A. C. 498, 3 B. W. C. C. 527. A sailor, if he has not reached the vessel itself, must be using some means of access to the vessel itself, owned or controlled by it and provided by it or permitted by it to be so used. If he is injured at any other point, whether it be a dock or quay or a gangway leading to another ship, which the sailor must cross to reach his own ship, no matter how near he may be to it and though the place where the accident occurs is one over which he must pass to reach it, compensation is denied. This is clearly shown by the two cases of Kitchenham *v.* S. S. Johannesburg, and Leach *v.* Oakley, Street & Co., argued together, [1911] 1 K. B. 523, 4 B. W. C. C. 91; [1911] A. C. 417, 4 B. W. C. C. 311, in the second of which compensation was granted to the dependents of the deceased who fell off the gangway between his own and another vessel and was drowned; in the first it was denied, the sailor having fallen from the dock before reaching the gangway of his ship. See also Hewitt *v.* S. S. Duchess, [1910] 1 K. B. 772, 3 B. W. C. C. 239 (aff'd in House of Lords, [1911] A. C. 671, 4 B. W. C. C. 317), and Kelly *v.* Foam Queen, 3 B. W. C. C. 113 (1910), in each of which the sailor fell off a public dock while or after hailing a boat to take him to his ship. In Kelly's case the boat hailed was a public one; in Hewitt's case it was his ship's boat. Had the sailor been injured while being rowed to his ship in a ship's boat it would seem that he would be entitled to recover, since such boat would seem to be as much a means of access to the ship as was the gangway in Moore's case. In Keyser *v.* Burdick & Co., 4 B. W. C. C. 87 (C. A., 1910), compensation was granted to a riveter injured while trying to leave a ship on which he had been working by sliding down a rope hanging from the side of the ship, which was the only means of leaving, the gangway having been removed, and in Kearon *v.* Kearon, 45 Ir. L. T. 96, 4 B. W. C. C. 435 (C. A., Ir., 1911), compensation was given to a sailor who tried to board his vessel on his return from leave by jumping from the dock to the boat some five feet away, there being no gangway or ladder and no attention having been paid to his hail.

ment of a workman entering his employer's premises begins; the vessel is regarded as the place at which the work is to be done, the ladders and gangways which are provided by the vessel and under its control are the equivalent of those parts of the premises provided by the master as an entrance to and exit from the place of work.[17]

Where a sailor has left the vessel without leave, he does not reënter the employment until he has actually returned to that part of the vessel where his duties require him to be.[18] If he has been allowed leave, it is his duty to return, and his return is required by his contract of employment, which contemplates undoubtedly a certain amount of shore-leave, and is in the course of his duty under it. On the other hand, if he is absent without leave, his entire excursion is contrary to his duty, and as such is outside the course of the employment, and his return as part of the improper excursion is itself a violation of his duty. A person employed for a definite term of service, as a sailor or a domestic servant, who, having temporarily quitted his employer's services for purposes of his own, in returning adopts a means of access to the vessel or to his master's premises not provided by the master nor permitted by him, can no more recover than could a workman who, instead of using the entrance provided or permitted by the employer, goes to his work by some other way of his own choosing. This is especially true where the means of access selected is unnecessarily dangerous.[19]

[17] In the most recent case, Fletcher Moulton, L. J., expressed the opinion that it is not necessary that the sailor should actually touch the ship or the means of access thereto provided by the master, but that it is enough if he has taken some specific step towards getting from the quay to the vessel, as if it were shown that in a dense fog he had fallen into the water while trying to find the gangway. So far the cases, whether dealing with the employment of a sailor upon a vessel or a workman employed to do work upon his master's premises, have made the workman's presence upon the employer's premises, or the means of access thereto provided by the master and required or allowed to be used by the servant, the decisive test as to the beginning of the employment; the test may be arbitrary, but it depends solely upon the external facts capable of exact proof. The *dictum* of Fletcher Moulton would destroy this test and substitute in place of it one purely subjective to the sailor depending upon what he intended to do and would introduce a multitude of difficult issues.

[18] Hyndman *v.* Craig & Co., 45 Ir. L. T. 11, 4 B. W. C. C. 438 (1910).

[19] Martin *v.* Fullerton & Co., [1908] Scot. Sess. Cas. 1030, 1 B. W. C. C. 168 (sailor hurt while attempting to jump from dock to vessel which he had left without leave); Watson *v.* Sherwood, 127 L. T. J. 86, 2 B. W. C. C. 462 (Birmingham Co. Ct., 1909) (club servant having overstayed his leave, hurt while attempting to reënter club through window). In both these cases it would seem that the servants probably selected dan-

Whether the employment be for a long period or whether it be by the day, it is quite evident that a workman cannot be expected to be actually engaged in laboring all the time; there must necessarily be periods of rest; needs of nature must be satisfied. Where the employment is for an extended period, this is the more obviously true; there is no question that a domestic servant or a sailor is in the course of his employment not only while doing his service or standing watch, but also while eating, sleeping, and resting.[20] But this is also true, though the employment is one for a limited number of hours. Here, again, the decisive test is that of place; the servant is held to be in the course of employment if, but only if, he is eating, drinking, resting, or otherwise satisfying the wants of nature upon his master's premises or at the place where the master's business is being carried on.[21] So, where workmen working by the day are required to take their dinner upon the premises, especially where an eating place is provided for them, they are clearly in the course of their employment in so doing, whether they are paid for the time so occupied or not. So, too, where workmen are, during the hours for which they are paid and during which they are required to be upon the premises, satisfying their natural wants and so making themselves physically fit for their labor, or waiting while no work is ready for them.[22] But it is not necessary that the workman's

gerous methods of getting back in order to avoid the detection of their unauthorized absence.

[20] Since domestic servants and sailors are required to eat, sleep, and rest upon their master's premises or vessel, they are clearly within the course of their employment while so doing. "I have no doubt that the leisure of a sailor on board the vessel is as much in the course of his employment as active work." Fletcher Moulton, L. J., in Marshall *v.* S. S. Wild Rose, [1909] 2 K. B. 46, 49.

[21] If the servant during his working hours, even with his master's permission, leaves the latter's premises for the purpose of satisfying the wants of nature, the master is not liable, though he has not provided facilities upon his premises for their satisfaction. Gilbert *v.* S. S. Nizam, [1910] 2 K. B. 555, 3 B. W. C. C. 455 (engineer of vessel in dry dock going to his home for dinner); McKrill *v.* Howard & Jones, 2 B. W. C. C. 460 (London Co. Ct., 1909) (solicitor's clerk taking walk in street during lunch hour); Cogdon *v.* Gas Co., 1 B. W. C. C. 156 (Sunderland Co. Ct., 1907) (plumber going to house of relation for a necessary purpose). But see Nelson *v.* Belfast Corp., 42 Ir. L. T. 223, 1 B. W. C. C. 158 (C. A., Ir., 1908).

[22] Earnshaw *v.* Railway, 115 L. T. J. 89, 5 W. C. C. 28 (Halifax Co. Ct., 1903). See also Henderson *v.* Glasgow, 2 Fraser 1127 (Scot. Ct. Sess., 1900) (a carter injured while waiting for his cart to be emptied by his fellow workmen), and Keenan *v.* Flemington Coal Co., 5 Fraser 164 (Scot. Ct. Sess., 1903) (miner injured while getting a drink of water).

presence should be required — it is enough that he is permitted by the master to remain upon the premises for this purpose; and so a workman allowed but not required to take dinner upon his master's premises was held to be within the course of employment though no wages were paid during the dinner hour and though he might have taken his dinner where he pleased.[23]

But there are two requirements: First, what the servants are doing must be ancillary to the employment, must be a necessary incident of it, the doing of something without which the workman could not properly carry on his work because of physical unfitness, or at least something which is so commonly done by workmen that the doing of it must be in contemplation by the employer when he engages them. Secondly, whether the servant is doing something "ancillary" to his employment or is on his way to or from it, he must not unnecessarily increase the risk of injury to himself and so the risk of liability to his master beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way.[24] And so he must not choose a needlessly dangerous path or means of transportation to or from his work. It is not necessary that he is using a place or path provided by his master.[25] It is enough that it is customarily used for these purposes by the workmen,[26] and that its use is not specifically forbidden.[27]

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[23] Blovelt *v.* Sawyer, [1904] 1 K. B. 271, 6 W. C. C. 16.

[24] It is upon this ground that Marshall *v.* S. S. Wild Rose, [1909] 2 K. B. 46, 2 B. W. C. C. 76; [1910] A. C. 486, 3 B. W. C. C. 514, seems to have been decided. The taking of air on a hot night is just as ancillary to an engineer's work as taking food or rest. It, however, appeared from the circumstances that he had probably chosen an unnecessarily dangerous place for the purpose.

[25] In Elliott *v.* Rex, The Times, Jan. 30, 1904, 6 W. C. C. 27 (Plymouth Co. Ct.), the place where the injury was received was one provided by the master.

[26] Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539, 2 B. W. C. C. 42; McKee *v.* Great Northern Ry., 42 Ir. L. T. 132, 1 B. W. C. C. 165 (C. A., Ir., 1908), where it seems to be held that a general order that the servants are not to use a short cut is immaterial, if the employer knew that a large number of workmen were in the habit of using it.

[27] In Barnes *v.* The Nunnery Coal Company, [1910] W. N. 248, 4 B. W. C. C. 43, it was held, Fletcher Moulton, L. J., dissenting, that a boy who chose a dangerous and forbidden method of getting to his working place could not recover. *Acc.* Kane *v.* Merry & Cunninghame, 48 Scot. L. Rep. 430, 4 B. W. C. C. 379 (Ct. Sess., 1911). *Cf.* McKee *v.* Great Northern Ry., *supra*. In these cases the dangerous way was selected to save the workman trouble.

But he must not choose a place[28] or path,[29] however convenient to him, which involves dangers greater in extent or different in kind from those incidental to the place or path provided or permitted.

In every case in which a workman, injured while coming or going to work or while engaged in doing something "ancillary" to his employment, has been given compensation, the injury has been in whole or in part one due to the nature or condition of the premises or vessel, or to some operation of the employer's business thereon, — in a word, because of some danger incident and peculiar to the place where he is required or entitled by virtue of his contract of employment to be for these purposes.[30] In no case has recovery

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[28] Brice *v.* Lloyd, Ltd., [1909] 2 K. B. 804, 2 B. W. C. C. 26. A workman for the sake of warmth took his supper on top of a tank full of boiling water. "Employment," says Farwell, L. J., "extends to all things which a workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises" [place of work?] "and to take his meals on the premises; but he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden." So in Thompson *v.* Flemington Coal Co., 48 Scot. L. Rep. 740 (Ct. Sess., 1911), it was held that the injury to a workman received while going for a necessary occasion into a small space under an engine did not arise out of his employment. Rose *v.* Morrison & Mason, 105 L. T. 2, 4 B. W. C. C. 277 (C. A., 1911). Compare with the Thompson case, Lawless *v.* Wigan Coal Co., 124 L. T. J. 532, 1 B. W. C. C. 153 (Wigan Co. Ct., 1908). In each case the place of convenience was some distance away; in each case the occasion was urgent, though in Lawless's case the place used was one customarily used by workmen in similar emergencies. In none of these cases was the use of the place specifically forbidden. See also Edmunds *v.* S. S. Peterston, 132 L. T. J. 6 (C. A., Oct., 1911).

[29] McLaren *v.* Caledonian Ry., 48 Scot. L. Rep. 885 (Ct. Sess., 1911) (a railway employee taking a short cut home along the tracks); Hendry *v.* United Collieries Co., [1910] Scot. Sess. Cas. 709, 3 B. W. C. C. 567 (workman injured while leaving pit by path neither sanctioned nor expressly prohibited but obviously involving considerable danger); Pope *v.* Hill's Plymouth Co., 102 L. T., 633, 3 B. W. C. C. 339 (C. A., 1910) (boy attempting to climb moving trucks to steal a ride home, a practice obviously dangerous but not specifically forbidden); Morrison *v.* Clyde Nav. Trustees, [1909] Scot. Sess. Cas. 59, 2 B. W. C. C. 99 (similar facts). In all these cases the dangerous path or means of transportation was chosen to save the workman exertion.

[30] Farwell, L. J., in Gilbert *v.* S. S. Nizam, [1910] 2 K. B. 555, 558, 3 B. W. C. C. 455: "The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment." "If he [he is speaking of a workman in a deep slate quarry] has to use some perilous means of access [or is required or permitted to satisfy his natural wants in a dangerous place], the dangers which he runs in such use are to my mind incident to his employment just the same as those he runs while actually working. It is by reason of the employment that he becomes subject to those risks." Fletcher Moulton, L. J., in Moore *v.* Manchester Liners, [1909] 1 K. B. 417, 2 W. C. C. 87, 97.

been allowed where the sole cause of the injury is the manner in which the servant is coming or going, eating, drinking, or resting, — as where a servant chokes himself while at his dinner.[31]

Granting that the servant has entered the employment of his master and has not definitely quitted it, the question arises as to whether he departs from it by doing work other than that which he is engaged to perform, or by doing his appointed work at a place other than that designated for that purpose or in a manner in which he has not been directed or permitted by the master to perform it.

"There are two ways," says the Lord President in Conway *v.* Pumpherston Oil Company,[32] "in which a servant may be without the sphere of his employment. One way — and in these cases the question is generally of easy solution — is where the servant does some other sort of work than that for which he is engaged. To take a very simple and obvious instance, — if the footman on the box of a carriage, with the consent of the coachman, took it into his head to drive his horses, there would be no question that if any accident happened it would not be in the course of his employment, for it is not part of a footman's business to drive, although it is part of his business to sit on the box. The other class of cases which raise more difficult questions is where a servant goes into what I think I may call a territory with which he has nothing to do."

An examination of the cases shows that even the first question is not a simple one. The phrase used is "in the course of his employment." On its face this seems to indicate that the accident must happen to a servant while he is engaged upon that part of the employer's general business which has been specifically entrusted to the particular servant. And this is the construction which the British courts have put upon it. The right of the master to regulate his own business and to assign specific tasks to specific workmen is fully recognized,[33] and the risk of liability which is placed upon him by the act is limited to those accidents which occur to workmen who confine themselves to the general boundaries of their allotted spheres of action.[34] But the workman is not rigidly re-

[31] O'Connor, J., in Cogdon *v.* Sunderland Gas Co., 1 B. W. C. C. 156 (1907).

[32] [1911] Scot. Sess. Cas. 660, 48 Scot. L. Rep. 632, 635, 4 B. W. C. C. 392.

[33] "It is and must be competent for a master to define and limit what that sphere of employment is." Collins, L. J., in Whitehead *v.* Reader, [1901] 2 K. B. 48, 3 W. C. C. 40, 43.

[34] Lowe *v.* Pearson, [1899] 1 Q. B. 261, 1 W. C. C. 5; Losh *v.* Evans, 19 T. L. R.

stricted to the exact acts which he is employed to do. Unless the servant undertakes work of a generically different kind and involving new and greater risks, a "reasonable latitude" is allowed to him in choosing his means of accomplishing his task. The test at best is a vague one, depending on the circumstances of each individual case, and must in practice give rise to uncertainties and litigation.[35]

Where "the work is divided into certain spheres and one man steps out of his class and undertakes to do work for which he is not fit and which is not entrusted to him," [36] and is injured, his injury is not received in the course of his employment. Compensation has from the first been consistently denied where a workman employed to do unskilled labor officiously attempts, save in an emergency, to do work requiring skill and experience for its safe performance, as where one whose work does not involve contact with machinery officiously meddles with it. The spheres of skilled and unskilled labor are regarded as quite distinct and separate.[37] But a skilled workman is not so rigidly confined to the precise sort of skilled work which he is specifically employed to perform, and so too an unskilled workman is probably not strictly confined to the exact form of unskilled labor entrusted to him — at least if the work voluntarily chosen does not involve risks substantially greater and different in kind. A reasonable latitude is allowed him in his choice of the means of accomplishing his task. He may do things which are not specifically entrusted to him and which are specifically entrusted to

142, 5 W. C. C. 17 (C. A., 1903); Edwards *v.* International Coal Co., 5 W. C. C. 21 (C. A., 1899).

[35] If the object of the acts is to throw upon the business the cost of the injury which it does to those engaged therein, it would seem that a servant should be compensated for injuries received while doing work which in fact tends to further the general objects of the business, or which if successful would further them, irrespective of whether such work is specifically entrusted to him or not. It would seem better, therefore, to omit the words "in the course of employment" and to substitute some phrase which would make the business answerable for all damage which was received by those employed therein while engaged in work which in fact tended to further the general objects thereof.

[36] Lord Kinnear in Goslan *v.* Gillies, [1907] Scot. Sess. Cas. 68, 44 Scot. L. Rep. 71, 73.

[37] In Lowe *v.* Pearson, Losh *v.* Evans, and Edwards *v.* International Coal Co., *supra*, unskilled workmen were injured while attempting tasks requiring skill and experience for their safe performance. In Losh *v.* Evans, Collins, M. R., says, 5 W. C. C. 19–20: "It seemed to be clear that an employer was at liberty to . . . divide the labor of his workmen into unintelligent and skilled labor." See also Kerr *v.* Baird & Co., 48 Scot. L. Rep. 646 (Ct. Sess., 1911) (ordinary miner officiously firing shot or blast).

another employee, if they are reasonably necessary to enable him to perform his appointed task. Unless by officiously doing work for which he has not the requisite skill and experience the workman unduly increases the risk of injury to himself, or, perhaps, unless he is expressly forbidden to do it,[38] "it is enough that he has interposed in the furtherance of his master's business." [39] "Any accident resulting to a workman while engaged in promoting his employer's interests is *primâ facie*" within the act.[40]

The Scottish cases indicate that a servant, "besides having to perform special work, owes something to the community of his

[38] While the fact that a particular work officiously undertaken is expressly forbidden does not of itself take it out of the course of employment, Whitehead *v.* Reader, [1901] 2 K. B. 48, 3 W. C. C. 40 (where the injury to a workman employed to grind tools caused by his attempt to adjust the power belt on his machinery was held to arise out of and in the course of his employment though he had been expressly told not to touch the machinery), there is, especially in the later cases, a distinct tendency to regard disobedience as an important factor not only where the servant has done work not specifically entrusted to him, but also where he is doing his appointed work in an improper manner, or is going to or from his work at his employer's premises, or otherwise doing things ancillary to his employment. So, Farwell, L. J., in Brice *v.* Lloyd., Ltd., [1909] 2 K. B. 804, 2 B. W. C. C. 26, says: "a workman is not entitled to do things which are expressly forbidden." And in Kane *v.* Merry & Cunninghame, 48 Scot. L. Rep. 430, 4 B. W. C. C. 379 (Ct. Sess., 1911), and in Barnes *v.* Nunnery Coal Co., [1910] W. N. 248, 4 B. W. C. C. 42 (C. A., 1910), *ante*, n. 27, the fact that the way which the servant chooses to take to or from his work is prohibited seems to be regarded as of great importance. In the Irish cases a distinction seems to be drawn between a failure to observe a mere understanding or general order, McKee *v.* Great Northern Ry., 42 Ir. L. T. 132, 1 B. W. C. C. 165 (C. A., Ir., 1908), *ante*, n. 26; or the breach of a general regulation, Tobin *v.* Hearn, [1910] 2 I. R. 639, *infra*, n. 39, and disobedience of as pecific prohibition.

[39] Lord Pearson in Goslan *v.* Gillies, [1907] Scot. Sess. Cas. 68, 44 Scot. L. Rep. 71, where a clerk, a part of whose duties it was to weigh all the articles sent out, was injured while assisting some laborers to carry a brass frame to the weighing machine. See also Tobin *v.* Hearn, [1910] 2 I. R. 639, where a boy employed at a finishing machine in a boot factory was sent to have a sole remoulded. The operator in charge of the moulding machine being absent, the boy, though by the regulations the workmen were forbidden to change from one machine to another, attempted to remould it himself and was injured. A finding by the County Court that his injury did not arise out of and in the course of employment was held to be without evidence to support it, Samuel Walker, L. C., saying: "In trying to do the work himself he was acting under the mistaken idea that he was furthering his master's interests." It was also said that the "boy was accustomed on machinery though of a different sort." A distinction is also drawn between "a breach of general regulations" and "wilful interference with dangerous machinery and disobedience of orders."

[40] Lord McLaren in Menzies *v.* McQuibban, 2 Fraser 732, 735 (Scot. Ct. Sess., 1900), where an injury, received by a general laborer while assisting a machine man at his request to replace a belt, was held to be within the Act of 1897.

fellow workers, and must be helpful according to his experience when the necessity arises." [41] The test is whether "the master or overseer might reasonably have required him to perform" the act in question though outside of his usual sphere of work.[42]

A workman is still in the course of his employment though he is in an emergency doing acts which are entirely different from the work assigned him, which involve new and greater danger and which he is expressly forbidden to do under normal conditions. Such an emergency only exists where the master's interests are imperilled, and the servant's acts must be necessary for their protection. He may do such acts if they are necessary to preserve the master's property from destruction,[43] or to rescue a fellow workman, if such workman was imperilled under circumstances which would make the master liable to compensate him, if injured, for in such case the act is one which, if successful, would have preserved the master from liability or have lessened the amount thereof.[44] If, however, the servant or other person imperilled be not entitled to compensation if injured, the rescue has no tendency to protect the master's interest, and the servant's injury, received in attempting it, does not arise in the course of the employment.[45]

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[41] Lord McLaren in Menzies *v.* McQuibban, *supra.*

[42] Lord McLaren in Goslan *v.* Gillies, *supra.*

[43] Rees *v.* Thomas, [1899] 1 Q. B. 1015, 1 W. C. C. 9 (a mine boy held to be within the course of his employment while attempting to stop a runaway horse, though his employment had nothing to do with horses and he had got on the truck which the runaway horse was drawing contrary to orders and to steal a ride); Harrison *v.* Whittaker Bros., 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900). But in Collins *v.* Collins, [1907] 2 I. R. 104, it is held an injury received by a servant while trying to save his master's life or protect him from physical injury is not within the act.

[44] Mathews *v.* Bedworth, 106 L. T. J. 485, 1 W. C. C. 124 (Nuneaton Co. Ct., 1899); London & Edinburgh Shipping Co. *v.* Brown, 7 Fraser 488 (Scot. Sess. Cas., 1905); and see the curious case of Yates *v.* Colliery Co., [1910] 2 K. B. 538, 3 B. W. C. C. 418, where a collier, while assisting in removing a shockingly injured fellow miner, received a nervous shock so severe as to produce neurasthenia. See also Hapelman *v.* Poole, 25 T. L. R. 155, 2 B. W. C. C. 48 (dependents of an employee of a lion tamer, whose duties did not require him to come in contact with the lions, held entitled to compensation for his death while attempting to drive escaped lions back to their cage).

[45] Mullen *v.* Stewart, [1908] Scot. Sess. Cas. 91, 1 B. W. C. C. 204. In Powell *v.* Lanarkshire Steel Co., 6 Fraser 103 (Scot. Ct. Sess., 1904), it was held that a servant injured while endeavoring to save property which had been imperilled by his own acts done outside his sphere of employment and in disobedience of orders, was not entitled to compensation. But see Hapelman *v.* Poole, *supra.* So a servant, doing another's

It is evident that very difficult questions must arise as to whether an emergency in fact exists, what interests of the master are sufficiently important to make it the servant's duty or right to leave his appointed sphere of work to protect them, and whether the acts done were necessary or were merely officious or over-zealous. The first question is rendered especially uncertain by the fact that it is enough that the servant honestly believes that an emergency exists in which his master's interest requires him to go outside his normal sphere of employment; no such emergency need actually exist, nor need the master's person or property or interests be in actual peril.[46] Indeed it seems immaterial that there were no reasonable grounds for the workman's belief in its existence. The uncertainty, the opportunity for litigation created by making the right to recover depend on the claimant's state of mind, is obvious.

As to the second question, it seems impossible to draw any definite boundary not wholly arbitrary between interests of the master sufficiently important to justify the servant in departing from his normal sphere of labor and those which are not of sufficient importance to warrant his so doing. In every case save those covered by actual decisions, the question must be solved by a comparison of the benefit to the master and the added risk of injury to the servant and so of liability to the master. The Scottish cases show a tendency to regard as an emergency any situation when, because no one specially appointed is present to do the work in question, the master's business will be delayed or impeded unless someone, in whose sphere of duty such acts are not included, should perform them.[47] This is, however, limited to cases where the new work does not require skill which the servant doing it does not possess, or where the servant is not forbidden to do such work, but, on the contrary,

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work to oblige him, is not within the course of his employment. McAllan *v.* Perthshire County Council, 8 Fraser 783 (Scot. Ct. Sess., 1906).

[46] Harrison *v.* Whittaker Bros., 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900). Here a boy employed to grease the wheels of trucks used upon his employer's private railway, while waiting for trucks to grease, went to warm himself at a fire near to the lever of a switch. He saw a train approaching and, thinking the switch closed, pulled the lever to open it, and in so doing was injured. In fact the switch operated automatically and the engine would have opened it. It was held that the boy's story being believed, there was sufficient evidence to justify the County Court in holding that the injury arose out of and in the course of the boy's employment.

[47] The same idea appears in the recent Irish case of Tobin *v.* Hearn, [1910] 2 I. R. 639, *ante*, n. 39.

might be called upon to do it, though in fact no such demand is made upon him by one authorized to make it.[48]

Again, even granting the existence of an emergency, it may be a grave question as to whether the servant's act was necessary. In the early cases of Low *v.* Pearson[49] and Losh *v.* Evans[50] it would appear that the act of the unskilled servant in meddling with the machinery was wholly officious. There was no necessity for the claimant in Low *v.* Pearson, a boy employed to make balls of clay, to clean the machine. While he probably intended to be helpful, his aid was not required. In Losh *v.* Evans the girl who tried to start the machinery was taking a risk entirely out of proportion to the time which she would, if successful, have saved. Nor in either case was the act done in response to a request for help from those who were doing the work as part of their regular duties, as in Menzies *v.* McQuibban and Goslan *v.* Gillies, which may well be an important factor.

Another important question is how far a servant is entitled to go outside his appointed sphere in obedience to the orders of a superior. Of course, if such superior has the power to fix the spheres of labor for the workman, a workman, by obeying them, merely passes into a new "course of employment"; but even if he has not, it seems that the servant is justified if he honestly believe that such superior is authorized to employ him.[51] Honesty of the claimant's belief is, as in Harrison *v.* Whittaker Bros.,[52] the test of his right to compensation, and the same uncertainty, the same incentive to fraudulent claims and defenses designed to tire out the claimant is created. Yet if, as seems to be the case, the question of the servant's right to do work different from that which he is employed to do depends upon whether it is to the master's interest that he should do so, it

[48] As in Menzies *v.* McQuibban, 2 Fraser 732 (Scot. Ct. Sess., 1910). This in addition tends to show that, while the workman was not strictly within the line of his duty on this particular occasion, it was not outside the class of work for which the master believed him fitted, and therefore was willing to assume the risk of compensating him if injured while doing it.

[49] [1899] 1 Q. B. 261, 1 W. C. C. 5.

[50] 19 T. L. R. 142, 5 W. C. C. 17 (C. A., 1903).

[51] Brown *v.* Scott, The Times, June 12, 1899, 1 W. C. C. 11 (C. A.), where, however, the injured boy was a general helper, "a jack-of-all-trades." See also Menzies *v.* McQuibban, *supra*. But see Edwards *v.* International Coal Co., The Times, Nov. 13, 1899, 5 W. C. C. 21 (C. A.).

[52] 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900), *ante*, n. 46.

would appear that on the whole it is better to risk an occasional additional liability rather than that all discipline should be destroyed by requiring the servant to demand proof of his superior's right to give an order before obeying it, and there is much to be said in favor of the view expressed in Statham *v.* Galloway [53] that discipline requires a servant to obey orders of a superior though he knows they are unauthorized; indeed the workman has usually no actual choice, save that between obedience and immediate or future dismissal.

Two conceptions dominate the decisions. One is that it is the master's right to manage the business as he pleases, and not to be subject to any risk of liability other than that incident to his business as he has divided it. The other is that the strict requirements are relaxed when it is to the master's interest that they be relaxed. Compensation is for good servants who remain where they are put, or who only stray therefrom when they can more effectively serve their master by so doing. They may not add new risks not capable of being foreseen by their master when he engages them and designates their field of labor, unless by so doing they will probably save him from enough harm to compensate him for the added risks. The servant must serve in the master's way, as he is directed, or, in emergencies, as he has reason to believe the master would approve were he present, or as he, as a faithful servant owing to his master fealty and aid in time of peril, ought. There is no compensation for the servant "who can behave but won't," or who sets up his own will against his master's as to how the business can best be served.

The same general principles seem to apply where the workman has gone into "a territory with which he has nothing to do," and does his appointed work at some other place than that designated by the master or which is expressly prohibited by him. The one place may be so far distant, so entirely distinct from the other, that work, done at the one place, though otherwise of the same general nature as that done at the other, may well be regarded as a substantially different kind of employment, so that the choice of the place not designated may of itself put the servant outside the

[53] 109 L. T. J. 133, 2 W. C. C. 149 (Manchester Co. Ct., 1900). The whole opinion of Judge Parry is very interesting and suggestive. Compare with it McNicholas *v.* Dawson, 15 T. L. R. 242, 1 W. C. C. 80 (C. A., 1899).

course of his employment. As the master is answerable for injuries due to the nature and condition of the place of work, it is evident that an unauthorized change in the *locus* of the work does materially alter, without the master's consent, the risk of injury to the workman and so, if compensation were allowed, the risk of liability to the master.[54]

A servant also places himself outside of his employment if during his working hours and while upon his master's premises, and at the very scene of his appointed labors, he devote a part of that time, whether that during which he should be actually engaged upon his master's work or that during which he is left at leisure, to acts the sole object of which is to further some purely private object of his own, and which are neither appropriate nor intended to further his master's business, nor, like eating or resting, necessarily incident to any long-continued employment. Such acts have no relation to his employment save that they are done during his working hours or upon his employer's premises, or with his employer's tools or appliances. He ceases to serve his master, and becomes as it were his own servant, and is regarded as having completely quitted his employment for the time being as though he left his master's premises upon a private errand of his own.[55] And it seems to be

[54] See the instance given by Buckley, L. J., in Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747, 751, 4 B. W. C. C. 269, of a quarryman employed to quarry stone in quarry A., who goes to another quarry owned by his employer and is injured while working there. No actual case of this sort has been decided. On principle it would seem that if the second quarry was no more dangerous than the other and the workman's services were actually of use to the employer there, the servant should recover, especially if he had honestly misunderstood the directions of his master.

[55] Smith *v.* Lancashire & Yorkshire Ry., [1899] 1 Q. B. 141, 1 W. C. C. 1 (in which a railway porter got on the footboard of a moving train to speak to a friend and was there injured); Reed *v.* Great Western Ry., [1909] A. C. 31, 2 B. W. C. C. 109 (engine driver crossing tracks on his return from visit to another driver to whom he had returned a book); Williams *v.* Wigan Coal and Iron Co., 3 B. W. C. C. 65 (C. A., 1909) (engine driver boarding slowly moving engine to give another driver wages paid by mistake to the claimant); Hendry *v.* Caledonian R. Co., [1907] Scot. Sess. Cas. 732, 44 Scot. L. Rep. 584 (fish porter going over railroad tracks to inquire how many fish trucks were expected); Callaghan *v.* Maxwell, 2 Fraser 420 (Scot. Ct. Sess., 1900) (girl leaving her place to speak to a fellow workgirl. She had been forbidden to leave and the danger of so doing had been pointed out to her); and see the recent case of Curtis *v.* Talbot (C. A., Oct., 1911), briefly reported, in 131 L. T. J. 552 (surgeon volunteering as subject of scientific experiment). In the Hendry case an effort is made to distinguish Goodlet *v.* Caledonian R. Co., 4 Fraser 986 (Scot. Ct. Sess., 1902), where an engineer, who, having occasion to cross certain tracks to perform one of his duties, went further and crossed other tracks to speak to a fellow workman, and was struck by a train while

immaterial whether he is by so doing wrongfully converting his master's time to his own use, as where his work demands all of his time, or whether the master expressly permits or tacitly tolerates his servant devoting part of his working hours to his own purposes.

In the early cases the courts regard the "course of employment" as the important factor. In the later cases, on the contrary, the principal inquiry is whether the injury arose "out of" the employment. The same circumstances which in the early cases are held to take an injury out of the course of employment, the later cases regard as showing that it did not arise thereout.[56] A workman by officiously doing work or choosing a working place generically different from that assigned him by his master, or who has devoted part of his working time to his personal interests, is held in the later cases not to have put himself outside "the course of his employment," but to have created new risks not incidental to his employment nor within the contract of employment made with the master, so that his injury does not arise "out of" his employment.

Though the work officiously undertaken is not so generically different from, or the place selected so foreign to, that designated by the master that the servant is *ipso facto* put outside the course of his employment, and though the workman's object is not so personal that in pursuing it he temporarily quits his employment, yet the combination of these two elements, — deviation and self-interest, — neither by itself sufficient to take the injury out of the

returning and before he got back to the tracks where his duties lay, was held entitled to compensation, on the ground that the fish porter's work did not require him, like that of an engine driver, to cross tracks nor subject him to the risk of being run down by trains. In view of the decision in the House of Lords in Reed *v.* Great Western Ry., *supra*, where the plaintiff, an engine driver, was run down under very similar circumstances, this distinction seems unsound. It seems to be immaterial that the sufferer was normally subjected to similar risks in the course of doing his appointed work, if in fact the particular risk which injures him was one to which his regular labor would not on the particular occasion have subjected him.

[56] Even in the earlier cases there are distinct intimations that the liability imposed upon the master by the act is to be confined to those risks which at the time he employs the workman he could contemplate such workman would run. And, at least since the case of Challis *v.* London & South Western Ry., [1905] 2 K. B. 154, 7 W. C. C. 23, it has been consistently held that only those injuries arise out of the employment which result from risks commonly incidental thereto, that is, risks to which the employer when he engaged the workman and assigned him his duties does or ought to contemplate that the workman will be exposed in consequence of his employment upon the particular work assigned to him.

course of employment or prevent it from arising thereout, is held in the earlier cases to do the first and in the later cases the last. If the servant is injured in doing work other than that specifically assigned to him, though not generically different therefrom, his object in doing it is decisive of his right to compensation.[57] And, as has been seen, he may in cases of emergency do things utterly different in kind from those he is employed to do and which are normally forbidden. And where the workman is working at some unpermitted or prohibited place on the premises where his work ought to be done, though there is no such complete departure from the designated place of work as *ipso facto* to place him outside his employment, the test applied to determine the right to compensation is whether the servant has gone to the unpermitted premises for his own purposes or for the purpose of accomplishing the work entrusted to him, and whether he has thereby substantially increased the risks incident to his employment.[58] This is well

[57] In Whitehead *v.* Reader, [1901] 2 K. B. 48, 3 W. C. C. 40, *ante*, n. 38, great stress is laid on the fact that the claimant, an operative, injured while adjusting the belt of his machine, was "not officiously or for his own purposes meddling with that machinery." So in Goslan *v.* Gillies and Menzies *v.* McQuibban, *supra*, when the servant was allowed compensation, his sole object was to further his master's interests. Compare Tobin *v.* Hearn, [1910] 2 I. R. 639, *ante*, n. 39, with Cronin *v.* Silver, 4 B. W. C. C. 221 (C. A., 1911). In each case the claimant was injured by a machine other than that he or she was employed to operate. In the first case compensation was awarded since the claimant was "not actuated by mischief or meddlesome curiosity," in which case he could clearly not have recovered, Furniss *v.* Gartside, 4 B. W. C. C. 411 (C. A., 1911), but "was acting under the mistaken idea that he was furthering his master's interests." In the second case compensation was denied because her injury "was proved to have been occasioned by her either working or meddling with a machine with which she had no business to meddle and as to which it was a mere guess that it could be in any way connected with her employment." See also Whelan *v.* Moore, 43 Ir. L. T. 205, 2 B. W. C. C. 114 (C. A., Ir., 1909), where, against the express orders of their employer, the crew of a canal changed places by an arrangement among themselves and the driver in steering the boat fell into the canal and was drowned. See, however, Cambrook *v.* George, 114 L. T. J. 550, 5 W. C. C. 26 (Bridgend Co. Ct., 1903), in which case, however, it appeared that it was customary to change places and that the master's representative had been present while the servants were so working and had made no objection. So, while he testified he knew nothing of the change and would not have permitted it if he had known, the servants had reason honestly to believe that the change was at least tolerated.

[58] In Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747, 4 B. W. C. C. 269, *ante*, n. 54, Buckley, L. J., expresses the opinion that the workman's object in going to a prohibited place of work was immaterial. The master's prohibition so "fenced off" such place from "the area in which the employment was to take place" that it was "altogether outside the area of his employment." While regarding the servant's

shown by four recent cases, all decided within a few months of one another. In Conway *v.* Pumpherston Oil Co.[59] and in Harding *v.* Brynddu Colliery Co.[60] an injury was held to have been received in the course of the workman's employment because the workman, though injured at a point where he was specifically prohibited to go, had gone there for the purpose of accomplishing the work he was employed to do, in the first case to get a tool necessary for his labor, and in the latter to see why a drill which he was operating was working badly. In Traynor *v.* Addie[61] and Weighill *v.* South Benton Colliery Co.[62] the same courts held that a workman who had gone to a prohibited place which he knew to be dangerous was outside the course of his employment, since he went there not to accomplish any specific work entrusted to him. In the first case it was not shown what led the miner to go to the prohibited and dangerous place; in the second, a miner who was paid by the amount of coal mined chose to work at a dangerous place because the coal was soft and could be mined more easily and quickly than a harder coal at the proper and safer place.

From the first it has been said that disobedience of orders does not of itself terminate the employment nor place the servant outside of it unless he has in disobedience of orders done work entirely different, in kind and in the risks involved, from that entrusted to him, or has done his work at a place altogether foreign to that designated by his employer.[63] And it is generally held that an injury resulting from a workman's negligence in carrying out his appointed

object in going into a prohibited place as immaterial, he regards the purpose of the prohibition as important. If a certain place is designated because the work can be more efficiently done there, as where porters in a factory are required to carry goods by certain definite routes, and not to secure the safety of the servant, disobedience will not put the servant out of the course of his employment. He will simply be doing it in a forbidden way.

[59] 48 Scot. L. Rep. 632, 4 B. W. C. C. 392 (Ct. Sess., 1911).

[60] [1911], 2 K. B. 747, 4 B. W. C. C. 269.

[61] 48 Scot. L. Rep. 820, 4 B. W. C. C. 357 (1910).

[62] [1911], 2 K. B. 757, n. (C. A., 1911).

[63] "If a workman acting within that sphere" (the sphere of his employment as limited by his master) "violates an order of the master, the master may well be responsible. But if the workman travels out of the sphere, as limited by the master, and acts in violation of the master's orders, or if the breach of the master's orders involves the workman's travelling outside the sphere of his limited employment, I do not think that the master would be liable for the consequences of the workman's acts either to the workman or to third parties." Collins, L. J., in Whitehead *v.* Reader, 3 W. C. C. 40, 43.

task, disobedience of orders, or even his choice of an unnecessarily dangerous method of performing his work, may, none the less, arise out of his employment.[64]

But the line between the doing of prohibited work or the doing of permitted work in a prohibited place on the one hand, and on the other the doing of permitted work in a permitted place but in an improper or prohibited manner, is a very narrow and indefinite one.

Even in cases where there is no new work officiously undertaken, no place other than that designated by the master selected as a working place, but where under any reasonable view of the facts the servant has merely chosen an unnecessarily dangerous method of performing his allotted work, there is a marked tendency to make the workman's right to compensation depend upon his motive in doing his work in the particular way in which he has done it. Just as a deviation from the appointed sphere or scene of labor, though not so complete as of itself to terminate the employment, is held to prevent the injury resulting from arising out of it, if the workman so deviates solely for his own purposes, so here, if the servant selects an improper method of work for some private purpose of his own, the later cases tend to hold that the resulting injury does not arise out of his employment.

This tendency is especially exhibited in recent Scottish and Irish cases. In Revie *v.* Cummings,[65] a member of a gang of men who were employed in hauling heavy goods by a traction engine, and whose duty it was to apply the brakes when necessary, was injured under the following circumstances: Instead of walking by the truck, in order to save himself labor he rode upon one of the trucks; it being necessary to apply the brakes, he jumped down, and in so doing he stumbled and fell beneath the wheels. It was held that

[64] "I do not," says Fletcher Moulton, L. J., in Astley *v.* Evans & Co., [1911] 1 K. B. 1036, 1043, "think for one moment that the Act intended to provide only for those accidents which arose during or out of the proper performance by the workman of his contract of service." And later in the same case he says, p. 1044: "Negligence is no answer to the claim of the dependents, even disobedience is no answer; but if the man had ceased to be engaged in the master's work when the accident happened, then it would not or might not be in the course of his employment, and if the accident was not connected with the dangers to which he was exposed, but to dangers voluntarily sought by him, it might, even though it happened 'in the course of,' not arise 'out of,' the employment."

[65] 48 Scot. L. Rep. 831 (Ct. Sess., 1911).

his injury did not arise out of the employment, since it was not caused by any risk necessitated by his duties, but from a risk which he himself had added by voluntarily choosing for his own convenience to ride rather than walk.

In Clifford *v.* Joy,[66] a servant girl who had just washed her hair was called to the kitchen to take care of a baby in its cradle. Her hair still being wet, she sat for the purpose of drying it at the side of the cradle nearest the fire. The loose sleeve of her dress caught fire and she was burned. It was held that her injury did not arise out of her employment, since she had chosen, because of something which it was not her duty to do, a place more dangerous than one, which, but for this private purpose, would have been as convenient for the performance of her service as nurse girl. The risk was one which arose not by reason of her employment, but solely because she had for her private purposes adopted this dangerous method of doing it.

To this principle also can be referred the case of McDaid *v.* Steel,[67] where compensation was refused an errand boy who, in taking fish to a customer, used the elevator in the customer's house in order to save himself the trouble of walking upstairs, and thereby exposed himself for his own purposes to new risks not a necessary incident to his employment and not within the contract of employment which he had made with the master.

In none of these cases was there a complete departure from the appointed work; on the contrary, what the servant was doing was appropriate and designed to accomplish the very piece of work entrusted to him. Nor had he arbitrarily chosen a scene of labor distinct from that designated by his master. In each case he was, when injured, at the general scene of his appointed work; in no case was the servant devoting a part of his time to doing something which had no relation to the work entrusted to him, but was solely for his own convenience. On the contrary, he was laboring to perform his appointed task, though the particular means was adopted because it was also appropriate to further his own purposes. While the servant would not have been injured had he not selected this particular means of doing his work, and though his injury is due to his desire to further his own private interests, it is equally clear that

[66] 43 Ir. L. T. 193, 2 B. W. C. C. 32 (C. A., Ir., 1909).

[67] 48 Scot. L. Rep. 765 (Ct. Sess., 1911).

he would not have been injured had he not been endeavoring to accomplish the work entrusted to him, and so his injury is also due to his efforts to serve his master.

The nurse girl in Clifford *v.* Joy would not have been burned in minding the baby had she not while doing so sat near the fire in order to dry her hair; but she was not burned solely because she was drying her hair. Had she not had to mind the baby, she would have continued drying her hair in the open air. She was burned because she was trying to accomplish two things at once, — to perform her duties as nurse-maid and at the same time to dry her hair. So neither the brakeman nor the errand boy in Revie *v.* Cummings and McDaid *v.* Steel were riding on the truck or the elevator simply for his own amusement. While the one might have performed his duties as brakeman and the other could have delivered his goods without so doing, it is quite certain that the only private purpose which they had — to do their master's work with the least possible exertion — had relation to their work and grew out of it.

In all of these cases the method which they chose, while it made the work more dangerous to them, did not make it less efficient to accomplish the object of their employment. In fact, in McDaid's case it actually tended to expedite the performance of the master's business as well as to save the errand boy exertion. In all of these cases the workman was doing his appointed work at its permitted scene, and compensation was denied him solely because he chose for his own convenience and to save himself trouble, or for some other purpose of his own, a method of doing the work which increased the risks normally incident to it. Here, as well as in those cases where there is a deviation from the sphere of employment not so complete as *ipso facto* to terminate it, the workman's object is decisive. What, then, is regarded as a private purpose of the workman, and to what extent must his object be to serve it? It is not necessary that his object be personal gain. An injury arising from a deviation or from a dangerous method chosen by a servant to oblige a friend would not arise out of the employment. It is enough that he has any definite end in view other than the accomplishment of the work entrusted to him by his master.

In determining whether the workman is dominated by self-interest, by a desire to accomplish his own purposes, the immediate object of his choice of work or place or manner of working is deci-

sive. If his immediate object be to facilitate the work entrusted to him, he is not barred because there is a chance of incidental benefit to himself. A workman's desire to obtain such benefit as will follow work well done is not a "private purpose of his own." On the other hand, if his object be to save himself trouble or to increase his earnings, or to accomplish a private end while doing his employer's work, the mere fact that the master's work would thereby be more rapidly or efficiently done does not make it any the less a private purpose of the workman's. Where the workman has no personal end to serve in doing his work in an unnecessarily dangerous way, his injury, though due to the method selected, arises out of the employment. If he is actuated by an honest belief, however mistaken and wrong-headed, that in this way he will facilitate the work entrusted to him, this is clearly so;[68] but he need not have such definite belief. It is enough if he has not any personal end to serve. He may recover where he has no particular conscious object at all, but selects the dangerous method out of sheer stupidity or recklessness.[69] The final test is the immediate object the servant has in view. This is subjective to the servant and depends wholly upon his state of mind as exhibited by his actions.

Francis H. Bohlen.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL.

[*To be continued.*]

[68] As in Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747, 4 B. W. C. C. 269, *ante*, n. 54; Tobin *v.* Hearn, [1910] 2 I. R. 639, *ante*, n. 39.

[69] As in Astley *v.* Evans & Co., [1911], 1 K. B. 1036, 4 B. W. C. C. 209, aff'd in House of Lords, [1911] A. C. 674, 4 B. W. C. C. 319.